

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>United Power Line Council's Petition for Declaratory</b>	)	
<b>Ruling Regarding the Classification of Broadband Over</b>	)	<b>WC Docket No. 06-10</b>
<b>Power Line Internet Access Service as an Information</b>	)	
<b>Service</b>	)	

**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION  
INITIAL COMMENTS**

The National Telecommunications Cooperative Association (NTCA)<sup>1</sup> hereby responds to the Wireline Competition Bureau's Public Notice<sup>2</sup> seeking comment on the United Power Line Council's (UPLC) petition (Petition)<sup>3</sup> regarding the Federal Communications Commission's (Commission or FCC) classification of broadband over power line (BPL) Internet access services as an information service. The Commission should deny the UPLC Petition because the BPL record is insufficient, premature, and lacks detailed examples of commercially viable trials in rural markets, and granting reduced regulatory oversight will encourage electric ratepayer cross-subsidies.

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<sup>1</sup> NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents 560 rural rate-of-return regulated incumbent local exchange carriers (ILECs). All of its members are full service local exchange carriers, and many members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). NTCA members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

<sup>2</sup> Wireline Competition Bureau Sets Pleading Cycle for Comment on United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service As An Information Service, WC Docket No. 06-10, DA 06-49, Public Notice (rel. January 11, 2006) (Public Notice).

<sup>3</sup> *Petition of the United Power Line Council For a Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service As An Information Service*, filed December 23, 2005 (UPLC Petition).

## I. INTRODUCTION

On January 11, 2006, the Commission released its Public Notice for comment regarding UPLC's Petition. UPLC urged the Commission to declare its BPL-enabled Internet access service as an interstate information service under Title I, 47 USC Sec. 153(20), rather than a telecommunications service under Title II of the Communications Act of 1934 as amended.<sup>4</sup>

This request is based on three grounds:

- 1) UPLC contended that BPL is similar to other broadband services (cable modem and DSL) that the Commission has already classified as information services;<sup>5</sup>
- 2) UPLC contended that classifying BPL as an information service is in the public interest as it will promote broadband access and competition; and
- 3) UPLC also contended that the Commission can base its decision on the record already developed on BPL.<sup>6</sup>

## II. ARGUMENT

The Commission should deny the UPLC Petition because UPLC failed to cite specific examples of commercially viable BPL service offerings upon which to base its decision.

UPLC's vague references to "various trials"<sup>7</sup> and various dockets prevent the Commission and commenters from conducting an accurate, in-depth analysis of the BPL technologies to determine if the BPL technologies should be classified as "information services." UPLC

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<sup>4</sup> 47 U.S.C. Sec. 153(20) (defines an information service as the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service).

<sup>5</sup> *Notice of Inquiry Concerning High-speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, GN Docket No. 00-185, 17 FCC Rcd 4798 (2002) (Cable Modem Declaratory Ruling), *aff'd National Cable Telecomms. Assn. v. Brand X Internet Svcs.*, 125 S. Ct. 2688 (2005); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, CC Docket No. 02-33, 2005 WL 2347773 (2005) (Wireline Broadband Order).

<sup>6</sup> UPLC Petition at 4-6, 10.

<sup>7</sup> *Id.* at 2.

encourages the Commission to rely on future expectations rather than current realities and cannot support its claim that BPL enhances the electric grid. Furthermore, any ruling is premature given the pending appeals of the Commission's DSL Wireline Broadband Order.<sup>8</sup>

**A. Classification of BPL As An Information Service Is Premature Because The Record Is Insufficient To Test The Technology.**

UPLC contended that the Commission can base its decision on the record already developed on BPL and refers to the Commission's BPL Inquiry and the BPL Rulemaking proceedings.<sup>9</sup> These dockets, however, do not provide sufficient support as they focused on BPL in the abstract, and not on a particular BPL application. Furthermore, the bulk of the comments in the BPL Rulemaking and associated Notice of Inquiry came from amateur radio operators who focused only on radio frequency interference. The Commission must develop its BPL record further to be able to test, measure and, if appropriate, differentiate among specific BPL technologies to see if the BPL technology merits reduced regulatory controls.

UPLC also directed the Commission to some comments filed in a DSL proceeding, BPL data contained in the record from the *Fourth Section 706 Report* and the *High-speed Services*

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<sup>8</sup> Several appeals have been filed in the Third Circuit Court of Appeals and the District of Columbia Circuit Court of Appeals, and petitions for reconsideration have been filed with the Commission. See Appeals: *Comptel v. FCC* – D.C. Circuit, Docket No. 05-1457, Petition for Review filed 12/14/05; *ACN Communications et al. v. FCC* – D.C. Circuit, Docket No. 05-1458, Petition for Review filed 12/16/05; *Time Warner v. FCC* – 3rd Circuit, Docket No. 05-4769, Petition for Review filed 10/26/05; *Earthlink v. FCC* – 3rd Circuit, Docket No. 05-5153, Petition for Review filed 11/23/05. Petitions for Reconsideration: Arizona Corp. Commission filed 11/16/05; Verizon filed 11/16/05; Computers-N-Service filed 11/17/05; and Peter Radizeski filed 11/11/05. The D.C. Circuit Court of Appeals recently granted the Commission's unopposed motions to consolidate all appeals in the Third Circuit Court of Appeals. *Comptel v. FCC*, D.C. Circuit, Docket No. 05-1457, Order (Jan. 30, 2006), *ACN Communication et al. v. FCC*, D.C. Circuit, Docket No. 05-1458, Order (Jan. 30, 2006).

<sup>9</sup> *Inquiry Regarding Carrier Current Systems, including Broadband Over Power Line Systems*, Notice of Inquiry, ET Docket No. 03-104. 18 FCC Rcd 8498 (2003) (BPL Inquiry); *Carrier Current Systems including Broadband Over Power Line Systems and Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems*, Notice of Proposed Rulemaking, ET Docket Nos. 03-104 and 04-37, 19 FCC Rcd 3335 (2004) (BPL Rulemaking).

*July 2005 Report*,<sup>10</sup> and Comcast's predictions for the future of BPL, contained in Docket MB 05-255 *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*.<sup>11</sup> This information consists of general assertions, not hard data or detailed descriptions of a particular service. UPLC cited only two specific attempts to implement BPL,<sup>12</sup> and two data points do not create a sound foundation upon which the Commission should base its decision. The Commission should not rely on UPLC's implications of competitive ability but, instead, should require hard, concrete examples that demonstrate BPL can and is exerting competitive pressures on the high speed Internet market. The UPLC Petition's vague references to BPL trials are not sufficient to permit the Commission, commenters, or appellate courts to examine the characteristics of the BPL service.

The Commission recognized that BPL is not a significant market shareholder for broadband services ("While the Commission does not report individual market share data for all technologies, power line high-speed line market share appears to be less than 1%").<sup>13</sup> BPL is still so new and untried that there is not enough data for an accurate classification.<sup>14</sup> Critics may contend that the regulatory classification should occur before BPL establishes an appreciable market share, but this approach risks misclassification and arbitrage as it tests hypotheticals, not realities. The Commission should wait until BPL providers present a stronger, substantiated case.

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<sup>10</sup> UPLC Petition at 10.

<sup>11</sup> *Id.*

<sup>12</sup> Those two cities are Manassas, Virginia and Cincinnati, Ohio. UPLC Petition at 7.

<sup>13</sup> Wireline Broadband Order, n. 97.

<sup>14</sup> Contrary to UPLC's assertion, the Commission's reluctance to include BPL in the Wireline Broadband Order was not merely "procedural." UPLC Petition at 9, n. 17. The Commission, rather, correctly concluded that BPL is different from cable modem and DSL in several critical aspects, each of which deserves careful, deliberate review.

The Commission should not assume that all BPL technologies or BPL-enabled services are the same without proof. Had the Commission assumed all Internet Protocol-enabled services were the same, the Commission would have missed the critical distinctions presented in the pulver.com and the AT&T “IP-in-the-Middle” examples. One critical distinguishing characteristic is whether a particular flavor of BPL or BPL-enabled service (such as a Voice over Internet Protocol or VoIP service) burdens the public switched telephone network (PSTN). This test is critical to the survival of the PSTN and those who have invested heavily in creating and maintaining the PSTN infrastructure, especially rural carriers. If BPL receives a blanket classification as an information service, then all BPL-enabled voice services would be exempt from access charges without any accounting for jurisdictional separations. This would also likely result in improperly preempting state commission jurisdiction over BPL services.

UPLC contends that BPL is an interstate, rather than intrastate, service because “Consumers access information over the Internet from any point anywhere in the world, using the electrical distribution grid and in-premises wiring. As such, BPL is an information service that is jurisdictionally interstate, like cable and DSL.”<sup>15</sup> The Commission cannot test this assertion and jurisdictionally separate the information based on the void created by generalities in the record. Without the ability to focus on a specific type of BPL Internet access service, the Commission could unintentionally mandate zero compensation for the BPL service provider’s use of local networks without considering the jurisdictional cost shifts involved. The Commission should therefore take into consideration state commission jurisdiction and the

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<sup>15</sup> *Id.* at 5.

separation of carrier property and expenses between interstate and intrastate operations in order to avoid issues of preemption and confiscation.

The better approach would be for the Commission to consider a specific form of BPL, much as the Commission entertained petitions by AT&T regarding its “AT&T IP-in-the-Middle” VoIP product,<sup>16</sup> and Frontier,<sup>17</sup> SBC<sup>18</sup> and VarTec<sup>19</sup> petitions regarding their types of IP-enabled services. Those fact-laden petitions provided far more concrete data and information than the UPLC Petition and will permit the Commission to base its decision on a sound footing, rather than on hypothetical scenarios.

**B. The Record Lacks Evidence That BPL Is Commercially Viable In Rural Markets.**

The FCC, early in its BPL Rulemaking proceeding, opined that: “Because power lines reach virtually every home and community in the country, we believe that these new systems, known as Access broadband over power line or Access BPL, could play an important role in providing additional competition in the offering of broadband services to the American home and consumers, and in bringing Internet and high-speed broadband access to rural and underserved areas.”<sup>20</sup> This view, while aspirational, is not grounded on record evidence.

UPLC touts its rural applications but cites only to trials in Manassas, Virginia and Cincinnati, Ohio, as examples of how BPL could bring broadband and the Internet to the masses. These urban trials, however, do not demonstrate that BPL is commercially viable in rural

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<sup>16</sup> *Petition for Declaratory Ruling That AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, *Order*, 19 FCC Rcd 7457 (2004) (AT&T IP-in-the-Middle Order).

<sup>17</sup> *Frontier Petition for Declaratory Ruling That USA Datanet Corp. Is Liable for Originating Interstate Access Charges When It Uses Feature Group A Dialing To Originate Long Distance Calls*, WC Docket No. 05-276.

<sup>18</sup> *SBC Petition for Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges*, WC Docket No. 05-276.

<sup>19</sup> *VarTec’s Petition for Declaratory Ruling*, WC Docket No. 05-276 (Aug. 20, 2004).

<sup>20</sup> BPL Rulemaking, ¶ 1.

markets. According to the 2000 census, Cincinnati's population was 331,285 with a population density of 4,249 people per square mile,<sup>21</sup> and Manassas had a population of 35,135 with a population density of 3,537 people per square mile.<sup>22</sup> These are not rural areas, and UPLC fails to cite to BPL trials or service offerings in any truly rural areas.<sup>23</sup> Bringing broadband Internet access to rural areas may be, in some commenters' minds, the motivating force behind freeing BPL from old-style common carrier regulations. The record, however, does not support this approach; rather, BPL appears to be a niche application that is only commercially viable in urban areas. Consequently, the Commission cannot rely on the current BPL record as a means to support a conclusion that BPL will bring broadband to rural markets.

**C. The Record Demonstrates That BPL Will Promote Electric Ratepayer Cross-Subsidies But Does Not Demonstrate That BPL Will Improve The Nation's Electric Grid.**

UPLC asserts that: "By using the existing electric distribution infrastructure and by leveraging the benefits of its utility applications, BPL can be deployed quickly and cost-effectively in rural isolated communities."<sup>24</sup> These assertions are aspirational in nature and not based on record evidence. UPLC also fails to support its assertion that BPL will be (as opposed to can be) used to bring broadband to rural areas and, consequently, the Commission should deny the Petition.

UPLC, by lauding the use of the existing electric grid, admits that BPL providers will have a strong incentive to employ cross-subsidies using the electric distribution system. This is a

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<sup>21</sup> <http://www.infoplease.com/us/census/data/ohio/cincinnati/> (visited February 8, 2006).

<sup>22</sup> <http://www.infoplease.com/us/census/data/virginia/manassas/> (visited February 8, 2006).

<sup>23</sup> Compare, for example, Montana, which has a population density of 6.2 people per square mile, <http://www.infoplease.com/us/census/data/montana/> (visited February 8, 2006), or Alaska, which has a population density of 1.1 people per square mile, <http://www.infoplease.com/us/census/data/alaska/> (visited February 8, 2006).

<sup>24</sup> UPLC Petition at 8.

cost-shifting business strategy that state public service commissions, consumer advocates and their electric ratepayers may find to be economically inefficient and objectionable. The Commission should not extend reduced regulatory treatment to a service provider who uses a technology that violates economic efficiency principles and social policy.

UPLC claims that BPL will enhance the electric distribution service by providing real-time two-way connectivity, and monitoring cameras.<sup>25</sup> Whether BPL will enhance reliability of the national electric grids while providing universal access for broadband services remains to be determined. The record will not support such a conclusion because UPLC draws from a very shallow database of samples (two, to be exact). The Commission should deny the Petition for lack of foundation.

**D. The Commission Should Direct BPL Providers To Document Their Burden On The PSTN And, If Appropriate, Contribute To The Universal Service Fund And Pay Access Charges.**

Based on the current record evidence available, the Commission cannot test whether a particular BPL technology or the services that ride over that technology uses North American Numbering Plan (NANP) telephone numbers to facilitate voice calls throughout the PSTN. The Commission can, however, affirm its long-standing directive that those who burden the PSTN must pay for the PSTN and can direct BPL service providers to document that burden.<sup>26</sup> To determine BPL's burden on the PSTN, the Commission should examine each specific type of BPL service to see if it uses the PSTN in the same way as other carriers who pay access and

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<sup>25</sup> *Id.* at 7.

<sup>26</sup> In the IP-Enabled services NPRM, the Commission stated that, as a policy matter, it believes that "any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network." *IP-Enabled Services*, Notice of Proposed Rulemaking, ¶ 33, WC Docket No. 04-36 (rel. March 11, 2004). The Commission further maintained that "the cost of the PSTN should be borne equitably among those that use it in similar ways." *Id.*



contribute to universal service in recognition of the fact that their use imposes costs on the underlying ILEC network. Other questions the Commission should ask are: From the customer's perspective, is the particular BPL-enabled voice service identical to traditional telephone voice service? Can the customer rely on BPL-enabled voice services for 911 emergency calls? What law enforcement and homeland security measures should apply to BPL? The Commission should not automatically exempt BPL providers from USF, access charges and other social obligations without testing the technology, and that test must be based on significant record evidence.

If BPL providers were allowed a free ride from contributing to the USF or from paying access charges, the Commission would be handing BPL providers an unfair advantage in the highly competitive voice communications market in direct conflict with its own principle of competitive neutrality. Exemption or forbearance of BPL-enabled VoIP service from access charges would force ILECs to unjustly raise their customer rates to recover costs imposed on their networks by BPL-enabled VoIP providers or incur substantial revenue losses. ILEC consumers would have no protection from either higher end-user rates, degradation in the quality of their underlying ILEC network, or the possible loss of their carrier of last resort. Rate shock and potential loss of subscribers to the PSTN networks would be a very real possibility, particularly for lower income consumers who do not qualify for LifeLine or Linkup support and who cannot afford a high-speed Internet access connection. The Commission should apply the same approach to any traffic sent over the PSTN that uses BPL Internet access services.

#### IV. CONCLUSION

For the reasons set forth, the Commission should deny the UPLC Petition.

Respectfully submitted,

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February 10, 2006

## CERTIFICATE OF SERVICE

I, Gail Malloy, certify that a copy of the foregoing Initial Comments of the National Telecommunications Cooperative Association in WC Docket No. 06-10, DA 06-49 was served on this 10th day of February 2006 by electronic mail to the following persons.

/s/ Gail Malloy

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